Michigan Register

Issue No. 1– 2009 (Published February 1, 2009)

GRAPHIC IMAGES IN THE

MICHIGAN REGISTER

COVER DRAWING

Michigan State Capitol:

This image, with flags flying to indicate that both chambers of the legislature are in session, may have originated as an etching based on a drawing or a photograph. The artist is unknown. The drawing predates the placement of the statue of Austin T. Blair on the capitol grounds in 1898.

(Michigan State Archives)

PAGE GRAPHICS

Capitol Dome:

The architectural rendering of the Michigan State Capitol's dome is the work of Elijah E. Myers, the building's renowned architect. Myers inked the rendering on linen in late 1871 or early 1872. Myers' fine draftsmanship, the hallmark of his work, is clearly evident.

Because of their size, few architectural renderings of the 19th century have survived. Michigan is fortunate that many of Myers' designs for the Capitol were found in the building's attic in the 1950's. As part of the state's 1987 sesquicentennial celebration, they were conserved and deposited in the Michigan State Archives.

(Michigan State Archives)

East Elevation of the Michigan State Capitol:

When Myers' drawings were discovered in the 1950's, this view of the Capitol – the one most familiar to Michigan citizens – was missing. During the building's recent restoration (1989-1992), this drawing was commissioned to recreate the architect's original rendering of the east (front) elevation.

(Michigan Capitol Committee)

Michigan Register

Published pursuant to § 24.208 of
The Michigan Compiled Laws

Issue No. 1— 2009
(This issue, published February 1, 2009, contains
documents filed from January 1, 2009 to January 15, 2009)

Compiled and Published by the
State Office of Administrative Hearings and Rules

Michigan Register (ISSN 0892-3124). Published twice per month, with a cumulative index, by the State Office of Administrative Hearings and Rules, pursuant to §24.208 of the Michigan Compiled Laws. Subscription $400.00 per year, postpaid to points in the U.S. First class postage paid at Lansing, Michigan. Direct all mail concerning subscriptions to State Office of Administrative Hearings and Rules, Ottawa Building - Second Floor, 611 W. Ottawa, P.O. Box 30695, Lansing, MI 48933

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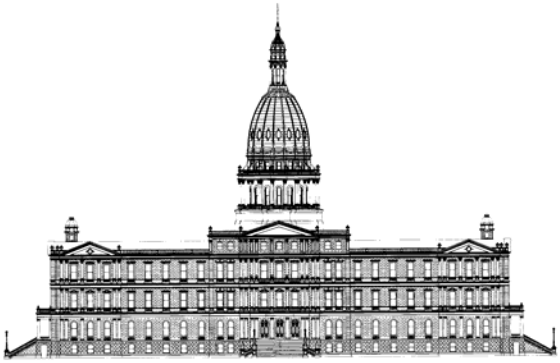
Jennifer M. Granholm, Governor



John D. Cherry Jr., Lieutenant Governor

PREFACE

PUBLICATION AND CONTENTS OF THE MICHIGAN REGISTER

The State Office of Administrative Hearings and Rules publishes the *Michigan Register*.

While several statutory provisions address the publication and contents of the *Michigan Register*, two are of particular importance.

24.208 Michigan register; publication; cumulative index; contents; public subscription; fee; synopsis of proposed rule or guideline; transmitting copies to office of regulatory reform.

Sec. 8.

(1) The office of regulatory reform shall publish the Michigan register at least once each month. The Michigan register shall contain all of the following:

(a) Executive orders and executive reorganization orders.

(b) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.

(c) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.

(d) Proposed administrative rules.

(e) Notices of public hearings on proposed administrative rules.

(f) Administrative rules filed with the secretary of state.

(g) Emergency rules filed with the secretary of state.

(h) Notice of proposed and adopted agency guidelines.

(i) Other official information considered necessary or appropriate by the office of regulatory reform.

(j) Attorney general opinions.

(k) All of the items listed in section 7(m) after final approval by the certificate of need commission under section 22215 of the public health code, 1978 PA 368, MCL 333.22215.

(2) The office of regulatory reform shall publish a cumulative index for the Michigan register.

(3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

(4) If publication of an agency's proposed rule or guideline or an item described in subsection (1)(k) would be unreasonably expensive or lengthy, the office of regulatory reform may publish a brief synopsis of the proposed rule or guideline or item described in subsection (1)(k), including information on how to obtain a complete copy of the proposed rule or guideline or item described in subsection (1)(k) from the agency at no cost.

(5) An agency shall electronically transmit a copy of the proposed rules and notice of public hearing to the office of regulatory reform for publication in the Michigan register.

4.1203 Michigan register fund; creation; administration; expenditures; disposition of money received from sale of Michigan register and amounts paid by state agencies; use of fund; price of Michigan register; availability of text on internet; copyright or other proprietary interest; fee prohibited; definition.

Sec. 203.

(1) The Michigan register fund is created in the state treasury and shall be administered by the office of regulatory reform. The fund shall be expended only as provided in this section.

(2) The money received from the sale of the Michigan register, along with those amounts paid by state agencies pursuant to section 57 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.257, shall be deposited with the state treasurer and credited to the Michigan register fund.

(3) The Michigan register fund shall be used to pay the costs of preparing, printing, and distributing the Michigan register.

(4) The department of management and budget shall sell copies of the Michigan register at a price determined by the office of regulatory reform not to exceed the cost of preparation, printing, and distribution.

(5) Notwithstanding section 204, beginning January 1, 2001, the office of regulatory reform shall make the text of the Michigan register available to the public on the internet.

(6) The information described in subsection (5) that is maintained by the office of regulatory reform shall be made available in the shortest feasible time after the information is available. The information described in subsection (5) that is not maintained by the office of regulatory reform shall be made available in the shortest feasible time after it is made available to the office of regulatory reform.

(7) Subsection (5) does not alter or relinquish any copyright or other proprietary interest or entitlement of this state relating to any of the information made available under subsection (5).

(8) The office of regulatory reform shall not charge a fee for providing the Michigan register on the internet as provided in subsection (5).

(9) As used in this section, "Michigan register" means that term as defined in section 5 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.205.

CITATION TO THE MICHIGAN REGISTER

The *Michigan Register* is cited by year and issue number. For example, 2001 MR 1 refers to the year of issue (2001) and the issue number (1).

CLOSING DATES AND PUBLICATION SCHEDULE

The deadlines for submitting documents to the State Office of Administrative Hearings and Rules for publication in the *Michigan Register* are the first and fifteenth days of each calendar month, unless the submission day falls on a Saturday, Sunday, or legal holiday, in which event the deadline is extended to include the next day which is not a Saturday, Sunday, or legal holiday. Documents filed or received after 5:00 p.m. on the closing date of a filing period will appear in the succeeding issue of the *Michigan Register*.

The State Office of Administrative Hearings and Rules is not responsible for the editing and proofreading of documents submitted for publication.

Documents submitted for publication should be delivered or mailed in an electronic format to the following address: MICHIGAN REGISTER, State Office of Administrative Hearings and Rules, Ottawa Building - Second Floor, 611 W. Ottawa, P.O. Box 30695, Lansing, MI 48933.

RELATIONSHIP TO THE MICHIGAN ADMINISTRATIVE CODE

The *Michigan Administrative Code* (1979 edition), which contains all permanent administrative rules in effect as of December 1979, was, during the period 1980-83, updated each calendar quarter with the publication of a paperback supplement. An annual supplement contained those permanent rules, which had appeared in the 4 quarterly supplements covering that year.

Quarterly supplements to the Code were discontinued in January 1984, and replaced by the monthly publication of permanent rules and emergency rules in the *Michigan Register*. Annual supplements have included the full text of those permanent rules that appear in the twelve monthly issues of the *Register* during a given calendar year. Emergency rules published in an issue of the *Register* are noted in the annual supplement to the Code.

SUBSCRIPTIONS AND DISTRIBUTION

The *Michigan Register*, a publication of the State of Michigan, is available for public subscription at a cost of $400.00 per year. Submit subscription requests to: State Office of Administrative Hearings and Rules, Ottawa Building - Second Floor, 611 W. Ottawa, P.O. Box 30695, Lansing, MI 48933. Checks Payable: State of Michigan. Any questions should be directed to the State Office of Administrative Hearings and Rules (517) 335-2484.

INTERNET ACCESS

The *Michigan Register* can be viewed free of charge on the Internet web site of the State Office of Administrative Hearings and Rules: www.michigan.gov/cis/0,1607,7-154-10576_35738---,00.html

Issue 2000-3 and all subsequent editions of the *Michigan Register* can be viewed on the State Office of Administrative Hearings and Rules Internet web site. The electronic version of the *Register* can be navigated using the blue highlighted links found in the Contents section. Clicking on a highlighted title will take the reader to related text, clicking on a highlighted header above the text will return the reader to the Contents section.

Peter Plummer, Executive Director
State Office of Administrative Hearings and Rules

2009 PUBLICATION SCHEDULE

Issue No.	Closing Date for Filing or Submission Of Documents (5 p.m.)	Publication Date
1	January 15, 2009	February 1, 2009
2	February 1, 2009	February 15, 2009
3	February 15, 2009	March 1, 2009
4	March 1, 2009	March 15, 2009
5	March 15, 2009	April 1, 2009
6	April 1, 2009	April 15, 2009
7	April 15, 2009	May 1, 2009
8	May 1, 2009	May 15, 2009
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OPINIONS OF THE ATTORNEY GENERAL

CUMULATIVE INDEX

OPINIONS OF THE ATTORNEY GENERAL

MCL 14.32 states in part:

"It shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer"

MCL 24.208 states in part:

"Sec. 8. (1) The State Office of Administrative Hearings and Rules shall publish the Michigan register at least once each month. The Michigan register shall contain all of the following:

* * *

(j) Attorney general opinions. "

OPINIONS OF THE ATTORNEY GENERAL

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT:

Legality of radio-controlled fishing devices under MCL 324.48703(1)

FISH AND GAME:

A radio-controlled fishing device that enables its operator to catch a fish in the waters of this State by means of a rod and line that is not held directly in the operator's hand or in the operator's immediate physical proximity is not under the operator's "immediate control," and is not a device that may be used for sport fishing under section 48703(1) of the Natural Resources and Environmental Protection Act, MCL 324.48703(1).

Opinion No. 7222

December 22, 2008

Honorable Tony Stamas
State Senator
The Capitol
Lansing, MI

You have asked if the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.101 *et seq*, bars the use of radio-controlled fishing devices.

You indicate that the device involved is a miniature or small radio-controlled boat that can cast a fishing line, catch a single fish, reel the line in, and bring the fish to the person operating the radio-control unit from a remote location. According to information provided by your office and by searching the Internet, the typical radio-controlled boat is propelled by rechargeable batteries. A transmitter is used to send signals to the receiver mounted in the boat that controls both the boat's motion and the actions of the reel-and-line device. The boat's size ranges from four feet to seven feet long, depending on the type of fish to be caught. Conventional live and artificial lures are used. The range of the radio

device is several hundred yards, but as a practical matter, the operator of the control device must be able to maintain sight of the boat in order to properly direct its operations. When a fish is hooked, the operator directs the boat to return to the operator, who then chooses either to keep the fish or release it.

On its website,[1] the United State Patent Office provides the following abstract regarding radio-controlled fishing devices:

> A radio controlled fishing bait boat for delivering a baited fishing line to a remote location. The hull has a recessed channel on the lower side in which a propeller and a rudder are mounted. A convex deck cover covers a top portion of the hull. In the interior of the hull, battery-powered electric motors for controlling the propeller and the rudder, batteries, and a controller are arranged. Pivotable hatches are provided in the stern transom for access to bait storage compartments in the interior of the hull. A baited fishing line is loaded into the bait storage compartment. The bait boat is directed to a desired fishing location by use of a hand-held radio transmitter which sends signals to the bait boat to control its speed and direction. Once the boat has reached the desired fishing location, the fishing line is tugged to pull the baited fishing line out of the bait storage compartment and into the water. The design of the hull and the weight distribution of the boat allow the boat to duck under breaking waves to stably and effectively move through surf to a desired fishing location.

Furthermore, various website advertisements[2] explain how a radio-controlled boat may be maneuvered to reach areas remote from a boat or onshore location, thus eliminating the need for casting. The most sophisticated versions costing several thousand dollars are equipped with fish-finding radar, water depth and temperature sensors, and global positioning systems.

The Michigan Constitution imposes upon the Legislature the duty to protect the State's natural resources:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const 1963, art 4, § 52.]

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[1] See the entry for Patent Number 5,806,232, available at: <http://patft.uspto.gov> (accessed November 18, 2008).

[2] See, for example: <http://rcfishingworld.com> (accessed November 18, 2008).

As explained in *Tallman v Dep't of Natural Resources*, 421 Mich 585, 621-626; 365 NW2d 724 (1984), Michigan attaches great importance to the preservation and development of its fishery resources. Indeed, the State's commitment to this task "is historically rooted and constitutionally mandated." *Id.*, at p 625. The State's longstanding duty in this regard is as a public trustee to "forever maintain" the "high, solemn and perpetual trust" in the State's fishery resources through its game laws and regulations. *Id.*, at p 621, quoting *Collins v Gerhardt*, 237 Mich 38, 49; 211 NW 115 (1926) (holding that fishing in navigable waters is a public right subject to state game laws). See also section 1601 of the NREPA, MCL 324.1601 (providing that the Department of Natural Resources shall enforce state law regarding fish); *Attorney General v Hermes*, 127 Mich App 777, 785; 339 NW2d 545 (1983); OAG, 1945-1946, No 0-3228, p 267 (March 12, 1945) (opining that the Department of Natural Resources' predecessor agency had jurisdiction to protect fishing in all waters of the State).

The NREPA was enacted to consolidate and recodify Michigan laws relating to the environment and natural resources. Under Part 453 of the NREPA, sport fishing with hook and line is expressly allowed:

> In any of the navigable or meandered waters of this state where fish have been or are propagated, planted, or spread at the expense of the people of this state or the United States, the people have the right to catch fish with hook and line during the seasons and in the waters that are not otherwise prohibited by the laws of this state. [MCL 324.45301.]

Subchapter 3 of chapter 2 of the NREPA, MCL 324.44501 *et seq*, governs fisheries management. Within that subchapter is Part 487 of the NREPA, MCL 324.48701 *et seq*, which governs sport fishing in Michigan. Answering your question requires analyzing section 48703 of the NREPA, MCL 324.48703(1), which enumerates a broad range of fishing devices that cannot be used for catching fish:

> *A person shall not take, catch, or kill or attempt to take, catch, or kill a fish in the waters of this state* with a grab hook, snag hook, or gaff hook, by the use of a set or night line or a net or firearm or an explosive substance or combination of substances that have a tendency to kill or stupefy fish, or *by any* other *means or device other than a single line or a single rod and line while held in the hand or under immediate control,* and with a hook or hooks attached, baited with a natural or artificial bait while being used for still fishing, ice fishing, casting, or trolling for fish, which is a means of the fish taking the bait or hook in the mouth. A person shall not use more than 3 single lines or 3 single rods and lines, or a single line and a single rod and line, and shall not attach more than 6 hooks on all lines. The department shall have the authority to decrease the number of rods per angler. However, the department shall not reduce the number of rods per angler to less than 2. For purposes of this part, a hook is a single, double, or treble pointed hook. A hook, single, double, or treble pointed, attached to a manufactured artificial bait shall be counted as 1 hook. The department may designate waters where a treble hook and an artificial bait or lure having more than 1 single pointed hook shall not be used during the periods the department designates. In the Great Lakes or recognized smelt waters, any numbers of hooks, attached to a single line, may be used for the taking of smelt, alewife, or other bait fish. [Emphasis added.][1]

Another section of Part 487 provides that illegal fishing devices shall be confiscated. MCL 324.48711. Furthermore, MCL 324.48738 provides criminal penalties for using unlawful fishing devices.

As evidenced from the plain language in MCL 324.48703(1), to fulfill the State's statutory duty to protect its sport fisheries, the statute expressly prohibits a wide range of fishing devices or methods that would give a person an unfair or unsporting advantage and allows fishing with only a single line, or a single rod and line, which must be either "held in the hand" or kept "under immediate control." MCL 324.48703, however, does not specifically address whether a radio-controlled device is either a prohibited or permitted device for sport fishing. The question, therefore, becomes whether fishing by means of a rod and line mounted on a small boat remotely controlled by radio may reasonably be regarded as fishing with a "single line or single rod and line while held in the hand or *under immediate*

[1] This language is drawn from Chapter II, section 1 of 1929 PA 165.

control." (Emphasis added.) To answer this question, principles of statutory construction must be employed.

The primary goal of statutory construction is to determine and give effect to the intent of the Legislature as expressed in the statutory language. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). The term "immediate control" in MCL 324.48703(1) is not defined in Part 487. Where words are not defined in a statute, they must be construed and understood according to the common and approved usage of the language. MCL 8.3a. To determine that meaning, it is appropriate to consult dictionary definitions. *Title Office, Inc v Van Buren County Treasurer*, 469 Mich 516, 522-523; 676 NW2d 207 (2004).

When used as an adjective to modify the noun "control" as in MCL 324.48703(1), the word "immediate" can have different meanings, which in turn can lead to different conclusions regarding the legality of radio-controlled fishing devices. For example, it can have a temporal connotation, meaning "not separated in time; acting or happening at once; without delay; instant." Using this definition, a radio-controlled device could be allowed if it remained under the continual control of the operator without any interruption in time. "Immediate" can also have a physical connotation, however, meaning "having nothing coming between; with no intermediary; specif., *a*) not separated in space; in direct contact; closest; nearest." *Webster's New World Dictionary, Third College Edition* (1988). See also *Webster's Third New International Dictionary* (1976) ("acting or being without the intervention of another object, cause, or agency: DIRECT, PROXIMATE . . . being near at hand: not far apart or distant"). Using these definitions, a radio-controlled fishing device would be prohibited because the fishing line would be separated in space from the operator and would require the intervention of the radio controls as an intermediary.

Another rule of statutory construction provides assistance in resolving which of these definitions to use in ascertaining the intent of the Legislature: the meaning of the words must be understood taking into account the context in which the words appear. *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 539; 565 NW2d 828 (1997). "Immediate control" must, therefore, be understood in the context of Part 487's provisions that protect the State's sport fisheries. As the Michigan Supreme Court in *Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003), explained:

> The language [undefined in a statute] does not stand alone, and thus it cannot be read in a vacuum. Instead, "it exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense. When interpreting a statute, we must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" [Citations omitted.]

Additionally, to ascertain the Legislature's intent, the entire act should be read and meaning must be given, if possible, to every word of the statute to harmonize its provisions and carry out the Legislature's purpose. *Macomb County Prosecutor v Murphy*, 464 Mich 149, 160-161; 627 NW2d 247 (2001). A law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions. *Lansing Mayor v Michigan Public Service Comm*, 470 Mich 154, 168; 680 NW2d 840 (2004). Legislative intent is not to be determined from focusing on isolated words but by construing its terms in accordance with the surrounding text and the statutory scheme. *Breighner v Michigan High School Athletic Ass'n*, 471 Mich 217, 232; 683 NW2d 639 (2004). In seeking the meaning of words in a statute, words and clauses will not be divorced from those which precede and those which follow. *G.C. Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421-422; 662 NW2d 710 (2003).

Examining the operative language within the overall context of section 48703 and other provisions within Part 487, it is clear that a person is prohibited from catching a fish by the enumerated methods "or by *any* other means or *device*" other than a single line or a single rod and line (emphasis added). This language conveys an intent to ban the use of a particular device unless it is expressly authorized in section 48703(1). Moreover, other language in the same subsection indicates that the means and devices authorized by section 48703 are permitted only "while being used for still fishing, ice fishing, casting, or trolling for fish." Radio-controlled fishing would not appear to reasonably fall within the scope of these fishing methods. Furthermore, the phrase "under immediate control" appears directly after "held in the hand," suggesting that "immediate" is a physical limitation.

Section 48711 of the NREPA provides further evidence of the Legislature's restrictive intent with regard to devices that are authorized for sport fishing use. This section states in relevant part:

> *A person shall not have in his or her possession* any net, set lines, jack or other artificial light of any kind, dynamite, giant powder, or other explosive substance or combination of substances, hook and line, or *any other contrivance or device to be used for the purpose of taking fish* in violation of this part or any other act or part. [MCL 324.48711; emphasis added.]

To reiterate, MCL 324.48703(1) allows only a narrow range of devices consisting of a "single line" or "a single rod and line" that must be either "held in the hand or under immediate control." Reading all sections of Part 487 as a whole, the connotation that "immediate control" means control that is "close at hand" or in the operator's immediate physical proximity best effectuates the Legislature's intent. As radio controls are not listed among the devices authorized under MCL 324.48703(1), and as the fishing line positioned on the boat can only be controlled with the intervention of the radio-control device and is necessarily located at a distance from the operator, the fishing line is not under immediate

physical control and therefore, such a remote-controlled fishing device is not authorized under section 48703(1) of the NREPA.[1]

As new sport fishing innovations are developed and gain popularity, they may offer new opportunities for participation in the sport. But where the law is written in a way that restricts the devices that can be used for sport fishing, it is for the Legislature alone to authorize their use in Michigan.

It is my opinion, therefore, that a radio-controlled fishing device that enables its operator to catch a fish in the waters of this State by means of a rod and line that is not held directly in the operator's hand or in the operator's immediate physical proximity is not under the operator's "immediate control," and is not a device that may be used for sport fishing under section 48703(1) of the Natural Resources and Environmental Protection Act, MCL 324.48703(1).

MIKE COX
Attorney General

[1] This office is advised that the Michigan Department of Natural Resources (DNR), the agency charged by law with the responsibility for protecting Michigan's fishing resources, enforces Part 487 of the NREPA consistent with the interpretation provided in this opinion. The DNR interprets "immediate control" to mean that a fishing device must be "close at hand" to be a lawful device under Part 487. The DNR's interpretation of "immediate control" is a reasonable one. An interpretation of a statute by the governmental agency charged with its enforcement is "entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *In re Rovas Complaint*, 482 Mich 90, 108; 754 NW2d 259 (2008).

OPINIONS OF THE ATTORNEY GENERAL

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT:

DEPARTMENT OF ENVIRONMENTAL QUALITY:

ADMINISTRATIVE RULES AND REGULATIONS:

ADMINISTRATIVE PROCEDURES ACT:

Legal effect of the Department of Environmental Quality's operational memoranda

The operational memoranda developed by the Michigan Department of Environmental Quality to provide direction to staff, guidance to the regulated community, and consistency when enforcing the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*, are not "rules" requiring promulgation under the procedures provided for in the Administrative Procedures Act, MCL 24.201 *et seq*. Accordingly, they do not have the force and effect of law and are not legally binding on the public or the regulated community.

The Michigan Department of Environmental Quality may not use the failure to comply with its operational memoranda, procedures, guidance documents, and written correspondence as a basis for suspending or revoking a qualified consultant's or certified professional's certification, because none of these carry the force and effect of law. An order issued under MCL 324.21319a to abate an imminent risk to the public health, safety, welfare, or the environment is legally enforceable and may serve as a basis for revoking such certification.

The administrative rules governing revocation of certifications for qualified consultants and certified professionals found in Part 215 of the Natural Resources and Environmental Protection Act, MCL 324.21501 *et seq*, may incorporate the requirements of Parts 211 or 213 to effectuate the Legislature's declared intent in Part 215 to promote compliance with Parts 211 and 213.

Opinion No. 7223 December 22, 2008

Honorable Valde Garcia
State Senator
The Capitol
Lansing, MI 48909

You have asked several questions concerning the Michigan Department of Environmental Quality's practice of using what are commonly known as operational memoranda when enforcing Michigan's environmental laws, particularly concerning underground storage tanks, and concerning the validity of various rules promulgated pursuant to Part 215 of the Natural Resources and Environmental Protection Act, MCL 324.21501 *et seq*.

The Michigan Department of Environmental Quality (MDEQ) uses operational memoranda in several program areas to provide guidance to both staff and the regulated community and to enhance consistency when enforcing the requirements of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. Operational memoranda are utilized by several divisions within the MDEQ, including the Remediation and Redevelopment Division, whose duties include enforcing both Part 201 of the NREPA, MCL 324.20101 *et seq*, and Part 213 of the NREPA, MCL 324.21301 *et seq*. Part 201 sets forth the clean-up requirements for sites of environmental contamination and Part 213 sets forth the requirements for addressing releases from underground storage tanks.

Parts 211, MCL 324.21101 *et seq*, and 215 of the NREPA also address underground storage tanks. Part 211 and its corresponding administrative rules set forth the requirements that apply to designing, constructing, installing, and maintaining underground storage tanks. Part 215, among other things, establishes the procedures for qualifying those who may serve as "underground storage tank qualified consultants" and for certifying those who seek employment as underground storage tank professionals. Under Part 213, response activities, other than initial response activities under MCL 324.21307, may only be undertaken by a qualified consultant. Under Part 215, a qualified consultant must employ at least one certified professional. See 1998-2000 AACS, R 324.21504(3).

Within this statutory framework, your first three questions ask if operational memoranda or draft operational memoranda issued by the MDEQ have the same legal force and effect as promulgated administrative rules, and, if not, whether operational memoranda and draft operational memoranda have any binding legal effect on state employees, the public, and the regulated community. Your questions center around the use of operational memoranda as tools for regulating leaking underground storage tanks.

A rule promulgated in accordance with the Administrative Procedures Act (APA), MCL 24.201 *et seq*, has the force of law and is binding on state agencies that enforce the rule and the public at large. *Town & Country Lanes, Inc v Liquor Control Comm*, 179 Mich App 649, 658; 446 NW2d 335 (1989). Documents created by state agencies to help explain or interpret their statutory authority that are used for internal purposes or are available to the public for informational purposes only are not rules and cannot be enforced.

The APA includes a definition of the term "rule," which also provides that certain agency memoranda or interpretive statements fall outside the definition:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. *Rule does not include any of the following*:
>
> * * *
>
> (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
>
> (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory. [MCL 24.207(g) and (h); emphasis added.]

The MDEQ has advised this office of its view that operational memoranda are only intended to be interpretive and are, therefore, not regarded by the agency as rules within the meaning of the APA. Moreover, a review of the MDEQ's operational memoranda reveals that they are generally written as guidance to facilitate implementation of NREPA and do not by their terms impose any mandatory requirements.[1] But "'[t]he label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA.'" *Kent County Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 582; 609 NW2d 593 (2000) (citation omitted), *aff'd Bryne v Michigan*, 463 Mich 652; 624 NW2d 906 (2001). Instead, the focus is on the action taken by the agency "to see whether the policy being implemented has the effect of being a rule." *Id.*

In *Kent County Aeronautics Bd*, the policies under review were the "Equivalent Site Criteria" developed by the Michigan State Police in connection with the process by which local units could suggest construction sites for radio towers to be used in a public safety communication system as alternatives to those planned by the State Police. Under the applicable statute, the State Police was required to notify the local unit of the site selected for a tower and if the site's placement violated local zoning ordinances, the local unit could then suggest an alternative site or grant a special use permit. The criteria came into play when the county refused to grant a special use permit for land the State Police had chosen as a tower site. The Court rejected the county's argument that the criteria were a "rule" that could only be enforced if promulgated in accordance with the APA, explaining that the criteria were "simply an intergovernmental communication that does not affect the rights of the public." *Id.*, 239 Mich App at 583. Even though the criteria necessarily limited the scope of the county's ability to choose

[1] In your request, you refer to a February 2006 draft operational memorandum concerning soil gas and indoor air. It should be noted that this document has been revised as of June 2008 and the revised draft memorandum does not appear to set forth mandatory requirements but instead provides guidance on what the agency will deem acceptable response activities under Parts 201 and 213.

an alternate site, the Court reasoned that the criteria were intended to guide the local unit "by way of explanation [concerning] what will constitute an equivalent site." *Id.*

In addition, the Court determined that public rights were not impacted by the criteria because the public did not have a right to propose an alternate site – that right exclusively belonged to the local unit. According to the Court, the criteria were not rules because they did not have the force and effect of law, they did not require "compliance with any stipulations or requirements," they did not impose sanctions for failing to propose an equivalent, alternative site, and they were "analogous to agency correspondences or bound manuals that set forth guidelines for operation." *Id.*, at 583-584.

Similarly, in *Faircloth v Family Independence Agency,* 232 Mich App 391, 396; 591 NW2d 314 (1998), the Court held that an agency policy developed "for determining [a person's] eligibility" for state disability assistance was not a "rule" as defined in the APA. The fact that persons would be impacted by the policy was not enough to make it a rule:

> [W]here an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people because an interpretive statement is not, by definition, a rule under the APA. [232 Mich App at 404.]

Moreover, the fact that the policy merely explained the statute and did not itself have the force or effect of law militated against it being a rule: "[D]efendants' policy does not constitute a rule because it does not have the force and effect of law, but rather merely explains the statutory provision." *Id.,* at 405.

Thus, to the extent the MDEQ's operational memoranda are merely explanatory in nature – intended to provide information that will facilitate understanding of the minimum requirements of Parts 201 and 213 of the NREPA, provide guidance to the MDEQ staff in evaluating clean-up methods, and provide guidance to qualified consultants and certified professionals concerning the sufficiency of their

corrective action plans – they are legitimate tools for educating staff and the public regarding statutory requirements. To the extent the operational memoranda accurately reflect the relevant statutory requirements, the MDEQ staff can rely upon them to guide their enforcement efforts to achieve compliance with those statutory requirements.[1] Under these circumstances, the MDEQ does not enforce the operational memoranda themselves but rather the underlying statutory obligations. On the other hand, to the extent any guidance offered in an operational memorandum were to substantively deviate from the applicable statutory requirements, the guidance would be invalid.

It is my opinion, therefore, in answer to your first three questions, that the operational memoranda developed by the Michigan Department of Environmental Quality to provide direction to staff, guidance to the regulated community, and consistency when enforcing the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*, are not "rules" requiring promulgation under the procedures provided for in the Administrative Procedures Act, MCL 24.201 *et seq*. Accordingly, they do not have the force and effect of law and are not legally binding on the public or the regulated community.

Your fourth question asks whether the MDEQ may use the failure to comply with its operational memoranda, procedures, guidance documents, orders, and written correspondence as a basis for suspending or revoking a qualified consultant or certified professional's certification.

The MDEQ's regulation of qualified consultants and certified professionals is provided for in Part 215 of NREPA, MCL 324.21501 *et seq*, which includes a specific grant of authority to promulgate

[1] It is beyond the scope of this opinion and, accordingly, it does not address the effect of instructions provided to staff that govern the performance of an employee's job duties, the failure to comply with which can result in disciplinary action against the employee.

necessary rules. MCL 324.21544. R 324.21514 sets forth the grounds on which the certification of a qualified consultant or certified professional may be revoked. The part of the rule relevant to your inquiry is subsection (3), which provides that revocation may occur if a qualified consultant or certified professional violates Part 213 or Part 215 of the NREPA and the failure also (1) meets the definition of "other causes" in the rules or (2) constitutes a fraudulent practice under Part 213 or Part 215:[1]

> If a qualified consultant or certified professional performs an improper act or fails to perform a requirement specified in parts 213 or 215 of the act when obligated to do so and the act or failure to act constitutes a fraudulent practice as set forth in part 213 or part 215 of the act or meets the definition of "other causes" as defined in R 324.21501(h), . . . then the department shall provide a written notice of intent to revoke to the qualified consultant or certified professional stating its findings, and shall inform the qualified consultant or certified professional of the opportunity to voluntarily discontinue a certification pursuant to subsection (6) of this rule. [R 324.21514(3).]

The term "other cause" is defined by R 324.21501(h) to include numerous acts that may be cited by the MDEQ as grounds for revocation:

> (h) "Other cause" under sections 21542 and 21543 of the act, for which the department may suspend or revoke a qualified consultant or certified professional certification, means and includes, but is not limited to, the acts set forth in sections 21324 and 21548 of the act and all of the following acts:
>
> * * *
>
> (iv) *Failure to comply with parts 213 and 215 of the act and written directives issued by the department in conformance with parts 211, 213, and 215 of the act, including, but not limited to, any of the following:*
>
> *(A) Operational and informational memoranda.*
>
> *(B) Procedures.*
>
> *(C) Guidance documents.*
>
> *(D) Orders.*

[1] The Part 215 rules provide other independent grounds for revocation or suspension of the qualified consultant (QC) or certified professional (CP) certifications that are unrelated to the questions you have posed. Those grounds include: (a) the failure to maintain or meet the requirements for certification (R 324.21514(1) and R 324.21514(2)); (b) the submittal of information to MDEQ that the QC or CP knows to be false or misleading (R 324.21514(3)); and (c) a determination by the MDEQ that the public health, safety, or welfare is endangered.

(E) Written correspondence from department staff requesting information about a facility or site. [Emphasis added.]

Subsection (h)(iv) of R 324.21501 identifies the failure to comply with operational memoranda, procedures, guidance documents, and written correspondence as a basis for revoking certification. However, as discussed above, operational memoranda, procedures, guidance documents, and written correspondence are not themselves legally binding and do not have the force and effect of law. They may not, therefore, serve as an independent basis for revoking a qualified consultant or certified professional certification, and R 324.21501(h)(iv)(A), (B), (C), and (E) is unenforceable to the extent it purports to accomplish that result.

Consistent with this proposition, the MDEQ has informed this office that it does not use the failure to comply with operational memoranda as a basis for revoking a qualified consultant or certified professional certification. Moreover, as explained above, to the extent operational memoranda accurately reflect the applicable statutory requirements, the MDEQ may direct its staff's enforcement efforts toward achieving compliance with those statutory requirements and base certification revocation on the failure to meet them. Under these circumstances, revocation is not based on any failure to comply with the operational memoranda, but on the failure to comply with the underlying statutory obligations.[1]

It is also important to clarify, however, that an order issued under Part 213 would have the force and effect of law and it could be a basis for revocation of a qualified consultant or certified professional

[1] See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 46; 703 NW2d 822 (2005) (upholding the trial court's determination that the Legislature, as opposed to the policy adopted by the agency, established the criterion to qualify for the applicable discount and explaining that the fact that the department's revenue bulletin was not a promulgated rule was irrelevant, since the requirements of the bulletin were in fact the requirements of the underlying act).

certification. Under Section 21319a of Part 213, MCL 324.21319a, the MDEQ is expressly authorized to issue an order to abate an imminent risk to public health, safety, or welfare, or the environment. Unlike an operational memorandum, such an order is not a guidance document but an order specifically authorized by law.

It is my opinion, therefore, in answer to your fourth question, that the MDEQ may not use the failure to comply with its operational memoranda, procedures, guidance documents, and written correspondence as a basis for suspending or revoking a qualified consultant's or certified professional's certification, because none of these carry the force and effect of law. An order issued under MCL 324.21319a to abate an imminent risk to the public health, safety, welfare, or the environment, however, is legally enforceable and may serve as a basis for revoking such certification.

Your final question includes two parts. You ask whether: 1) the MDEQ may promulgate rules under Part 215 that apply to Parts 211 and 213 of the NREPA or whether Part 215 rulemaking authority is specifically limited to only that part; and 2) whether, under MCL 324.21106, the MDEQ may promulgate rules under another part of the NREPA and apply those rules to Part 211. Your request does not identify any specific Part 215 rule at issue and staff inquiries have not identified any Part 215 rule that is applied by the MDEQ in enforcing Parts 211 and 213 of the NREPA. It will therefore be assumed for purposes of this opinion that your questions refer to those Part 215 rules, such as Rule 324.21514(3) discussed earlier, that reference or incorporate provisions of Parts 211 and 213.

In *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 484; 499 NW2d 367 (1993), the Court identified a three-part test for determining the validity of rules: "(1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the

enabling statute; and (3) whether it is arbitrary or capricious." At issue in the *Dykstra* case was a rule promulgated pursuant to the Farmland and Open Space Preservation Act (Act) that governed when landowners could terminate an agreement to refrain from developing their land. The Act allowed a landowner to apply to the local governing body to request that a development rights agreement be terminated, but it also provided that the local government body "shall approve or reject an application 'based upon, and consistent with, rules promulgated by the state land use agency.'" *Id.*, at 486. Pursuant to the Act, the Michigan Department of Natural Resources (MDNR) had promulgated Rule 43, which set forth the factors local governing units should consider in granting or rejecting a landowner's application. Various landowners whose applications were denied sued to invalidate the rule.

Applying the three-part test, the Court first found that the Act concerned agreements not to develop certain types of land and that a rule addressing the circumstances under which those agreements could be terminated early was clearly within the subject matter of the Act. *Id.*, at 485-486. Secondly, recognizing that in the Act the Legislature had specified that applications should be approved or rejected based on the grounds established by the MDNR evidencing a legislative intent to provide "a statewide solution to potential statewide problems," the Court concluded that the rule also complied with the legislative intent underlying the enabling statute. *Id.*, at 489.

Analyzing the third prong of the test, the Court determined that the rule was not arbitrary or capricious. According to the Court, "[a] rule is arbitrary if it was 'fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance.'" *Id.*, at 490, quoting *Binsfield v Dep't of Natural Resources*, 173 Mich App 779, 786; 434 NW2d 245 (1988). And a rule is capricious if it is '"apt to change suddenly [or is] freakish, or

whimsical.'" *Id.* Finding that the rule was rationally related to the Legislature's intent and therefore not arbitrary or capricious, the Court held the rule was valid.

Your question therefore requires considering whether the Part 215 rules that reference or incorporate requirements of Part 211 and 213, including Rule 324.21514(3) that authorizes revocation of a qualified consultant or certified professional's certification for violating a requirement of Part 213 or 215, satisfy *Dykstra's* three-part test. First, these rules fall within the subject matter of Part 215. Section 21545 of Part 215 mandates that the "department shall promulgate rules to implement this part." MCL 324.21545. And the express legislative objective of Part 215 is to promote compliance with Parts 211 and 213:

> The objectives of this part are to address certain problems associated with releases from petroleum underground storage tank systems, *to promote compliance with parts 211 and 213*, and to fund environmental and consumer protection programs necessary to protect public health, safety, or welfare or the environment due to the sale, use, or release of refined petroleum products. [MCL 324.21504; emphasis added.]

Additionally, the broadly stated purpose of Part 215 is to protect against the adverse impacts to human health, the environment, and the economy from underground storage tanks – the same subject matter regulated by Parts 211 and 213:

> The legislature finds that underground storage tanks are a significant cause of contamination of the natural resources, water resources and groundwater in this state. It is hereby declared to be the purpose of this part and the authority created by this part to preserve and protect the water resources of the state and to prevent, abate, or control the pollution of water resources and groundwater, to protect and preserve the public health, safety, and welfare, to assist in the financing of repair and replacement of petroleum underground storage tanks and to improve property damaged by any petroleum releases from those tanks, to preserve jobs and employment opportunities or improve the economic welfare of the people of the state. [MCL 324.21505.]

Parts 211 and 213 comprehensively regulate the installation and operation of underground storage tanks and the clean-up of contamination of releases from underground storage tank systems. By

its express terms, Part 215 was clearly enacted to further these goals. Consequently, any rule promulgated pursuant to Part 215 that incorporates the requirements of Parts 211 and 213 would be within the subject matter of that statute and would pass the first part of the *Dykstra* test.

For these same reasons, these rules meet the second part of the *Dykstra* test – requiring a determination that the rules comply with the legislative intent underlying the enabling statute. The Legislature specifically stated that "promot[ing] compliance with parts 211 and 213" is the primary objective of Part 215. MCL 324.21504. Part 215 was thus intended to ensure compliance with Parts 211 and 213 and the legislative grant of authority to promulgate rules to implement Part 215 demonstrates an intent that the Part 215 rules may incorporate the requirements of Parts 211 and 213.

Finally, a rule promulgated pursuant to Part 215 would not be arbitrary or capricious because it incorporated the requirements of Parts 211 and 213. The Legislature twice stated its clear intent that Part 215 was enacted to promote compliance with Parts 211 and 213, and, therefore, the rule's incorporation of the requirements of those parts is rationally related to that legislative intent.

It is my opinion, therefore, in answer to your fifth question, that the administrative rules governing revocation of certifications for qualified consultants and certified professionals found in Part 215 of the Natural Resources and Environmental Protection Act, MCL 324.21501 *et seq*, may incorporate the requirements of Parts 211 or 213 to effectuate the Legislature's declared intent in Part 215 to promote compliance with Parts 211 and 213.

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CUMULATIVE INDEX

A

* Proposed Rules